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No. 80-552

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CALIFORNIA MANUFACTURERS ASSOCIATION, et al.,

Appellants,

v.

INDUSTRIAL WELFARE COMMISSION, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. WHETHER THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151, ET SEQ. AND THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ. PREEMPT THE CALIFORNIA INDUSTRIAL WELFARE COMMISSION'S ORDERS 1-80, 3-80, 4-80, 8-80, 9-80, AND 10-80?

II. WHETHER THE CALIFORNIA SUPREME COURT DENIED APPELLANTS PROCEDURAL DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT EXERCISED ITS ORIGINAL JURISDICTION TO REVIEW THE ORDERS OF THE CALIFORNIA INDUSTRIAL WELFARE COMMISSION (A QUASI-LEGISLATIVE STATE AGENCY) BASED UPON THAT AGENCY'S COMPLETE QUASI-LEGISLATIVE RECORD, AS WELL AS OTHER EVIDENCE AND PLEADINGS PRESENTED TO THE COURT, BUT WITHOUT THE COURT'S CONDUCTING A *DE NOVO* EVIDENTIARY HEARING?

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MOTION TO DISMISS OR AFFIRM

The appellees, Industrial Welfare Commission and the Division of Labor Standards Enforcement of the State of California, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of California on the ground that it is manifest that the questions presented by appellants, on which their appeal depends, are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

The Industrial Welfare Commission (hereafter referred to as the IWC or as the Commission) is a quasi-legislative agency of the State of California with the statutory (Lab. Code, §§ 70–74, 1171–1204) and constitutional (Cal. Const., Art. XIV, § 1) mandate to determine and set, by order, the minimum wages, maximum hours, and minimum working conditions for over 8,000,000 employees in 15 industries or occupational groups in California.

Appellants are employers and employer associations which are subject to the IWC orders 1-80, 3-80, 4-80, 8-80, 9-80, and 10-80. The six IWC orders in question are those which were adopted by the Commission in September 1979 and which were effective on January 1, 1980.

In mid-December 1979 the appellants filed actions in two California Superior Courts seeking to invalidate and stay the enforcement of the IWC orders applicable to them. Temporary stays of the enforcement of the orders were issued at the trial court level. Upon the petition of the IWC in February 1980 the California Supreme Court exercised its original jurisdiction on April 1, 1980, to resolve the legal challenges to the IWC's 1980 orders.[1] The California Supreme Court stayed the trial court proceedings and granted a hearing.

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[1] The California Supreme Court noted in exercising its original jurisdiction that the suits filed in 1979 were repetitious of the 1976 litigation and indicative of the "tortuous litigation history which had prevented the implementation of the majority of IWC wage orders in recent years. . . ." (*Industrial Welfare Com.* v. *Superior Court* (1980) 27 Cal.3d 690, 699.)

On April 9, 1980, the IWC transmitted the administrative record of its entire quasi-legislative process of consideration and adoption of its 1980 orders to the California Supreme Court. The administrative record, consisting of over 25,000 pages of investigative material, reports, hearing transcripts, meeting transcripts, petitions, and other documents, was also provided to the appellants.

On or about April 14, 1980, appellants filed with the California Supreme Court a complete appendix consisting of all the pleadings filed in each of the trial courts, including voluminous declarations under penalty of perjury of members of the various employer associations or the employer representatives concerning the issues raised.

After the California Supreme Court had received briefs from the parties on all issues, the Court heard extended oral argument on May 7, 1980. On July 10, 1980, the California Supreme Court issued its unanimous decision upholding the IWC orders against all legal challenges. The California Supreme Court's decision directed the trial courts to dissolve the stays of the IWC orders and enter judgment for the IWC.

The California Supreme Court subsequently denied the applications of appellants for a stay of enforcement of the IWC orders. On October 20, 1980, this Court denied appellants' application (A-253) for a stay of enforcement of the IWC orders applicable to them.

ARGUMENT [2]

[2] For a more comprehensive exposition of appellees' Argument see pages 1–31 of Respondents' Memorandum of Opposition to Applications For Stays of Peremptory Writ of Mandate of the Supreme Court of the State of California and, in the Alternative, for an Order Maintaining the Status Quo on Appeal and/or Pending Review on Certiorari, United States Supreme Court Nos. A-253 and A-254, filed September 24, 1980.

THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY RESOLVED BY DECISIONS OF THIS COURT

1. Neither the National Labor Relations Act Nor the Railway Labor Act Preempts the Regulation by the California Industrial Welfare Commission Orders.

Collective bargaining pursuant to the National Labor Relations Act (NLRA) or the Railway Labor Act (RLA) has not preempted California regulation providing for the establishment of a minimum wage, maximum hours, and minimum working conditions.

Federal courts have uniformly held that federal preemption should not be presumed absent a clear manifestation of an intent by Congress to preempt. (*Associated Gen. Contractors of Mass., Inc.* v. *Altshuler* (1st Cir. 1973) 490 F.2d 9, 15; *Double-Eagle Lubricants, Inc.* v. *State of Texas* (N.D. Tex. 1965) 248 F.Supp. 515, 517.) There is no such express statement of intent in either the NLRA or the RLA as to state regulation such as that performed by the IWC.

These principles were confirmed by the California Supreme Court in *Industrial Welfare Com.* v. *Superior Court,* (1980) 27 Cal.3d 690, 729 in which the court concluded that "existing federal and state labor statutes establish no bar to the IWC's promulgation of the 1980 wage orders [citations]." In *California Manufacturers Assn.* v. *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95 the Court of Appeal in discussing the NLRA and federal labor policy also confirmed that by stating:

"There is no attempt in these [1976 IWC] orders to

regulate organizational activities of employees or of employer-employee collective bargaining activities . . . [T]here is nothing in the . . . [NLRA] . . . to suggest that it was intended to divest the states of authority to set minimum working condition requirements. . . . It is clear that the regulation contained in the orders which are the subject of this lawsuit are within the scope of permissible state regulation. . . . We conclude that these orders are not automatically preempted by the existence of any of the federal laws or regulations cited." (*Id.,* at 119, 121.)

a. *The National Labor Relations Act.*

There is absolutely no language in the NLRA to suggest that the authority to join a labor union and to engage in collective bargaining should divest the states of authority to set *basic minimum* working condition requirements.

The issue of federal preemption in the labor law context has been considered by the United States Supreme Court in the case of *Farmer* v. *Carpenters* (1977) 430 U.S. 290. In *Farmer* this Court observed that while preemption does occur when the state regulates union activities or unfair labor practices, preemption does not result merely because of the existence of the NLRA.

". . . We have refused to apply the preemption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity 'was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not

infer that Congress had deprived the States of the power to act.' [Citation.]" (*Id.,* at 296–297.)

The California courts and the United States Supreme Court have long recognized that even though state regulation, designed to protect the interests and welfare of its citizens, may have an impact on federal labor law or interstate commerce, such impact does not invalidate state regulation. (Cf. *Bibb* v. *Navajo Freight Lines* (1959) 359 U.S. 520; *Mintz* v. *Baldwin* (1933) 289 U.S. 346; *Huron Cement Co.* v. *Detroit* (1960) 362 U.S. 440; *Head* v. *New Mexico Board* (1963) 374 U.S. 424.)

Deference to the federal *mechanism* for protecting collective bargaining and other concerted activities, or prohibiting unfair labor practices, under the preemption doctrine does not oust the IWC of its regulatory authority.

The clearest and most comprehensive analysis of the preemption issue in a setting similar to that which is presently under consideration is found in *Malone* v. *White Motor Corp.* (1978) 435 U.S. 497. The United States Supreme Court in *Malone* in analyzing Minnesota pension regulations and their effect on the Employee Retirement Income Security Act determined that local regulation which touches the interrelationships between employers, employees, and unions is not necessarily preempted. (*Id.,* at 504.) The United States Supreme Court acknowledged the fact that collective bargaining under federal statutes includes wages, hours, and working conditions and that pension benefits are proper subjects of collective bargaining. (*Id.,* at 504.)

With this in mind, the court in *Malone* concluded that the NLRA did not expressly or impliedly preempt local pension regulation.

> ". . . there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is pre-empted here, the congressional intent to do so must be *implied* from the relevant provision of the labor statutes. We have concluded, however, that such implication should not be made here. . . ." (*Id.,* 435 U.S. 497 at 504–505.)

And when faced with the question of how the pension regulation affected existing collective bargaining agreements the court responded:

> "Insofar as the Supremacy Clause issue is concerned, no different conclusion is called for because the Minnesota statute was enacted after the UAW-White Motor company agreement had been in effect for several years. Appellee points out that the parties to the 1971 collective-bargaining agreement therefore had no opportunity to consider the impact of any such legislation. Although we understand the equitable considerations which underlie appellee's argument, they are not material to the resolution of the pre-emption issue since they do not render the Minnesota Pension Act any more or less consistent with congressional policy at the time it was adopted. . . ." (*Id.,* 435 U.S. 497 at 514.) (Emphasis added.)

The *Malone* v. *White Motor Corp.* decision and the other authorities cited, make it clear that the IWC has the authority to promulgate and enforce the challenged

orders without any preemption by the NLRA. Federal preemption cannot be *implied* where there is in fact no express congressional intent or public policy to support preemption.

b. *The Railway Labor Act.*

The Railway Labor Act does not preempt state regulation of wages, hours, and working conditions. There is no express or implied congressional intent to preempt. This was made very clear almost 40 years ago in *Terminal Assn.* v. *Trainmen* (1943) 318 U.S. 1, at 6–7 where the United States Supreme Court stated:

> "*The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions.* Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working conditions as such.* . . . The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . . *We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field regulating working conditions themselves and did not preclude the State . . . from making the order in question.*" (Emphasis added.)

The orders of the IWC are only of peripheral concern to the federal bargaining law, are deeply rooted in local feeling and responsibility, and are the kind of orders that the courts have historically held to be outside of the preemption doctrine. (See *Sears, Roebuck & Co.* v. *Car-*

penters (1978) 436 U.S. 180, 188–189, fns. 12 and 13; *Farmer* v. *Carpenters, supra,* 430 U.S. 290, 295–297; *Vaca* v. *Sipes* (1967) 386 U.S. 171.) As we have maintained, the IWC's regulations are similar to workers' compensation and unemployment insurance which no one asserts have been preempted by collective bargaining agreements. (*Super Tire Engineering Co.* v. *McCorkle* (1974) 416 U.S. 115; on remand (3d Cir. 1977) 550 F.2d 903; *New York Telephone Co.* v. *New York State Department of Labor* (1979) 440 U.S. 519.)

As is clear from the discussion and authorities immediately above, the RLA does *not* preempt the state regulation of wages, hours, and working conditions.[3]

Appellants contend that the decision of the California Supreme Court in *Industrial Welfare Com.* v. *Superior Court, supra,* 27 Cal.3d 690, is in conflict with *Railway Employees' Dept.* v. *Hanson* (1956) 351 U.S. 225 and *California* v. *Taylor* (1957) 353 U.S. 553. To the contrary, the decision of the California Supreme Court is in accord with the decisions of this Court in *Hanson* and *Taylor.* Appellants do not point to any conflict between the IWC orders and federal labor law as required in *Hanson* and the RLA contains no expression of congressional intent to preempt the IWC orders as required by *Taylor.* Furthermore, neither *Hanson* nor *Taylor* is a case dealing with state regulation prescribing a minimum standard

[3] Over and above the legal authority for permissible state regulations, IWC order 9-80 (covering the transportation industry) has an express exemption for employees covered by collective bargaining agreements under the RLA.

for working conditions to protect health, safety, or welfare of employees but instead deal with direct interference with the collective bargaining *process* in conflict with expressed congressional intent.

The authorities for upholding regulation by the IWC in the areas of wages, hours and working conditions are clear and convincing. Appellants have in all respects failed to show that the IWC's orders are preempted in whole or in part by the NLRA or the RLA.

2. Appellants' Due Process Claim has no Merit; Judicial Review, Including That of the Preemption Issue, was Properly Based Upon the Record Before the California Supreme Court.

The appellants in this action contend that they have been denied due process of law under the Fourteenth Amendment. That denial is alleged to have occurred when the California Supreme Court in April 1980 agreed to review the legal validity of the Commission's challenged 1980 orders, that should have been fully enforceable on January 1, 1980. Appellants' assert that a *de novo* judicial evidentiary hearing is a *sine qua non* of the judicial review of the regulations of a state quasi-legislative agency. Such an assertion not only seriously misconstrues the scope of judicial review of regulations but also intentionally omits reference to the existence of the Commission's 25,000-page administrative record, which the California Supreme Court had before it during its judicial review of the 1980 orders. (The table of contents for the administrative record and the accompanying transmittal letter to the California Supreme Court is

attached as exhibit A to respondents' opposition to applications for stays (A-253, A-254).)

At issue before the California Supreme Court was the legal validity of Commission regulations, known as "wage orders," which constitute quasi-legislative action, authority for which is derived from the California Constitution. (Cal Const., Art. XIV, § 1.) These regulations set minimum wages, maximum hours and minimum working conditions for the general welfare of California employees.

a. *Scope of Judicial Review.*

The scope of judicial review of administrative regulations has been succinctly stated as follows:

> "California decisions on judicial review of administrative regulations reveal three kinds of inquiry: first, whether the agency has statutory authority to adopt a regulation of the kind under scrutiny; second, whether the action is arbitrary or entirely lacking in evidentiary support; third, whether the agency has complied with statutory procedures. The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant." (*California Assn. of Nursing Homes etc., Inc.* v. *Williams* (1970) 4 Cal.App.3d 800, 810.)

A reviewing court's function is indeed a limited one when its purpose, as it is here, is to review the operation of a coordinate and co-equal branch of government. As stated in the *California Optometric Assn.* case in discussing the California Administrative Procedure Act, which is one statutory set of criteria for regulation adoption in

California, similar to that of the Labor Code which pertains to the Commission:

> "One objective of the APA is assurance of meaningful *public participation* in the adoption of administrative regulations by state agencies; another is creation of an *administrative record* assuring effective judicial review." (*California Optometric Assn.* v. *Lackner* (1976) 60 Cal.App.3d 500, 506; emphasis added.)

b. *Record Under Review.*

The Commission's 1980 wage orders in addition to its 25,000-page administrative record came to the California Supreme Court with the benefit of statements as to the basis, which serve to require the agency itself, rather than the courts, to engage in the evidentiary review process. The statement as to the basis is described as follows:

> "The statement should reflect the factual, legal, and policy foundations for the action taken. The statement of basis must show that the order adopted is reasonably supported by the material gathered by or presented to the commission—through its own investigations, the wage board proceedings, and the public hearings—and is reasonably related to the purposes of the enabling statute." (*California Hotel & Motel Assn.* v. *Industrial Welfare Com.* (1979) 25 Cal.3d 200, 213.)

One of the purposes of the statement as to the basis, as described above, is to facilitate judicial review. (*Id.,* at 211.)

Thus, appellants' assertions concerning due process

and evidentiary hearings in the 1980 litigation seriously misstate the nature of what the California Supreme Court properly had before it for review. The California Supreme Court had reviewed a record consisting of more than 25,000 pages of administrative documentation and public hearing transcripts, the California Constitution and Labor Code, the 1980 wage orders, which included the statements as to the basis, the pleadings and declarations filed in the four California trial courts, and a chronological collection of all challenged IWC orders, some of which date back to 1916. The appellants were free at any time to point out to the California Supreme Court where support for their evidentiary assertions could be found in the record or in their previously filed trial court pleadings and declarations. Their unwillingness or inability to make such references to the evidentiary record demonstrates the weakness of their position that there was some added evidence that the California Supreme Court should have considered.

The purpose of the Commission's extensive administrative hearing process (which included a wage board for each industry or occupation and eight days of public hearings to revise regulations, some of which have been in existence for more than 50 years) is to allow interested parties to present their position to the Commission. In the instant case the appellants were involved in the promulgation process either because they participated on wage boards, submitted written statements of position, or make oral argument before the Commission. There has been no challenge by appellants to the due process accorded them by the Commission. It is during this extensive administrative review and adoption process that one must look for, and will find, due process.

c. *Due Process was Accorded Appellants.*

Due process is the right to notice and an opportunity to be heard "granted at a meaningful time and in a meaningful manner." (*Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552.) Due process is flexible and allows variances in the form of a hearing appropriate to the nature of the case. (*Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481; *Cafeteria Workers* v. *McElroy* (1961) 367 U.S. 886, 895; *Mullane* v. *Central Hanover Trust Co.* (1950) 339 U.S. 306, 313.) Specifically in regard to the Commission's regulations it has been said that "[o]rderly judicial review may be had without taking new evidence." (*Rivera* v. *Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 581.)

Here appellants had full opportunity to present their evidence to the Commission. In the context of the quasi-legislative process, that is the subject of review herein, it is during the administrative hearing process itself that an affected party should present its views. It is clear that the quasi-legislative process accorded appellants' due process. Further, the California Supreme Court authorized the filing of appellants' trial court pleadings and declarations, which had served as the basis for the trial courts' actions delaying in whole or in part enforcement of the challenged orders.[4] Finally, the California Su-

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[4] Appellants consciously chose to omit the preemption issue from their trial court action, stating as follows:

> "Petitioners did not raise the federal preemption issue in the state courts because, conceiving it to be purely a federal issue, they had decided to reserve it for determination in a collateral suit which they intend to file in the United States District Court." (Calif. Manuf. Assn., Juris. Statement, p. 3, fn. 2.)

Both federal and state courts disapprove of such selective resolution of issues. (*Dominguez Land Corp.* v. *Daugherty* (1925) 196 Cal. 468; *Baird* v. *United States* (1877) 96 U.S. 430.)

preme Court identified the issues to be addressed and provided both a briefing schedule and opportunity for oral argument.[5] Appellants participated in all parts of these administrative and judicial processes. They were given a reasonable time and place to present their views. They were accorded full due process.

Appellees' substantive discussion of the preemption issue, *supra,* makes it clear that the California Supreme Court properly decided the question as a matter of law. What needs to be examined in the preemption context is whether the Commission's orders have been preempted by the federal labor laws which provide a mechanism for collective bargaining. The Commission's orders themselves can be examined for an answer to that question. The Commission's orders establish a minimum wage, set maximum hours of work, and minimum working condition provisions. These minimum conditions apply to each industry or occupation, with special consideration being given in some cases to the unique needs of a particular industry or occupation. The Commission's orders do not regulate the collective bargaining process. As stated in *California Manufacturers Assn.* v. *Industrial Welfare Com., supra,* 109 Cal.App.3d 95, 118: "There is no attempt in these orders to regulate organizational activities of employees or of employer-

[5] Appellants submitted briefs on the preemption issue. Furthermore, the preemption issue was decided by the California Court of Appeal, Fourth Appellate District, in the 1976 antecedent to the current litigation. From reading that decision it is apparent that the preemption issue can be, and was properly, decided as an issue of law. (See *California Manufacturers Assn.* v. *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 118–121.)

employee collective bargaining activities."

The conflict, alleged by appellants, between the Commission's orders and collective bargaining agreements, does not support the implication of an intent by Congress to oust the states from an area of regulation so necessary to the welfare of California employees. There has been no showing made by appellants that the existence of an actual conflict, which is all their evidence would go to show, is dispositive of the preemption issue. In fact, the preemption issue can be, and was properly, decided on an analysis of the orders themselves as they relate to federal labor policy. That analysis failed to disclose preemption. There was no due process denial in reaching that decision.

CONCLUSION

For the foregoing reasons appellees submit that the questions upon which this appeal depends are so insubstantial as not to need further argument. Appellees, therefore, move the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered by the California Supreme Court.

Respectfully submitted,

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